

7 Official Opinions of the Compliance Board 170 (2011)

**Public Body – Determined not to be a public body – Attorney
General’s Committee on Campaign Finance**

May 19, 2011

Complainant:
Craig O’Donnell
Kent County News

Respondent:
Attorney General’s Advisory
Committee on Campaign Finance

The Open Meetings Compliance Board has considered your complaint that the Attorney General’s Advisory Committee on Campaign Finance (“ACCF”) violated the Open Meeting Act by holding several meetings in the fall of 2010 by failing to provide proper notice of its meeting and failing to prepare minutes in accordance with the Act. Because the Compliance Board finds that ACCF is not a “public body” subject to the Act, there was no violation.

I

Complaint and Response

The complaint alleged that ACCF repeatedly violated the Open Meeting Act by its failure to provide proper notice of its meeting and to provide minutes of the meeting. The complaint contends that the Attorney General is “either subject to the policy direction of the Governor, or ... is subject to the same requirements under the Act as the Governor” as provided in §10-502(h)(2).¹

In a timely response submitted on behalf of ACCF, Jeffrey L. Darsie, Assistant Attorney General, first argued that the ACCF was not created by any formal legal instrument enumerated in §10-502(h)(1). Second, he argued that §10-502(h)(2) cannot be interpreted as applying to the Attorney General for two reasons: (1) because the Attorney General is elected independently and is not subject to the policy direction of the Governor; and (2) ACCF was not appointed by the Governor but was appointed by the Attorney General. He noted that because the Attorney General is elected independently of the Governor, the Attorney General may make policy recommendations to the General Assembly or to the State Board of Elections.

¹ All statutory references in this opinion are to the State Government Article unless otherwise noted.

II

Analysis

The ACCF was formed by the Attorney General so that the Attorney General could receive insights from knowledgeable individuals on campaign finance issues. The Attorney General, based on the work of the ACCF, could then inform the General Assembly of suggested amendments to the campaign finance laws and the State Board of Elections could consider revisions of its regulations that relate to campaign finance. The ACCF consisted of twelve individuals: four state legislators, two employees of the State Board of Elections, a former federal regulator, two members of the Attorney General's Office, and the counsels of the Maryland Republican and Democratic State Central Committees.²

If an entity is not a "public body", it is not subject to the Open Meeting Act. The term "public body" means a multi-member entity established in one of three ways. First, it may be "created by" any of several formal legal enactments. §10-502(h)(1). Second, it may be "appointed by" the Governor or chief executive authority of a political subdivision or "appointed by an official who is subject to the policy direction" of the Governor or chief executive authority, but only if the appointees include at least two individuals from outside the government.³ §10-502(h)(2)(i). Third, it may be appointed either by a public body in the Executive Branch of State government, the members of which were appointed by the Governor or by an official who is subject to the policy direction of the public body, but only if the entity includes at least two individuals who are neither members of the appointing entity nor employees of the State. §10-502(h)(2)(ii).

A. Inapplicability of §10-502(h)(1)

The ACCF was not "created by" one of the formal means listed in the definition of a public body including a law, Executive Order, rule, or resolution. §10-502(h)(1). Rather, the ACCF was an informal body of individuals asked to provide the Attorney General with advice on campaign finance issues.

² The response from Assistant Attorney General Darsie on behalf of ACCF does not state specifically the number of times the ACCF met in 2010.

³ The ACCF included at least two individuals from outside of the government, counsels to the Republican State Central Committee and the Democratic State Central Committee.

B. *Inapplicability of §10-502(h)(2)(i)*

The ACCF would have been a “public body” had it been appointed by the “Governor.” §10-502(h)(2)(i). The complaint urges us to construe “Governor” to mean the Attorney General. We decline to do so as we are bound by the language of the statute as applying to boards, commissions or committees appointed by the “Governor” and not the Attorney General.

In addition, the ACCF would have been a “public body” had it been appointed by an “official who is subject to the policy direction of the Governor.” §10-502(h)(2)(i). In 4 *OMCB Opinions* 132 (2005), we examined the meaning of whether someone serves at the “policy direction” of the Governor or a chief elective authority. In that complaint, we considered whether or not an advisory body created by the Prince George’s County Planning Board was a public body because it was appointed by an official who is “subject to the policy direction of the ... chief executive authority of the political subdivision.” We found that while the members of the Planning Board were appointed by the County Executive, the chief executive authority for Prince George’s County, the Board was not subject to the policy direction of the County Executive. We noted that:

[U]nlike a county department head or a position in which the appointee is expected to *carry out* policies on behalf of the chief executive authority, the duties of the Planning Board are designated under State and local law, and the members owe a fiduciary duty to the Planning Board on which they serve. In our view, the Planning Board is not subject to the policy direction of the county executive as contemplated by the 2004 amendment to the Act.

4 *OMCB Opinions* at 138 (emphasis added and internal citations omitted).

The Attorney General is not appointed by the Governor. Section V, §1 of the Maryland Constitution establishes the Attorney General as an independent official elected by the voters of Maryland.⁴ As a state

⁴ See Dan Friedman, *Magnificent Failure Revisited: Modern Maryland Constitutional Law from 1967 to 1998*, 58 Md. L. Rev. 528, 560-561 (1999) (Explaining a proposal at the Constitutional Convention of 1967-1968 to eliminate statewide elective offices such as the Attorney General that was rejected and noting that “[c]urrently, neither the comptroller nor the attorney general is dependent on the governor for his or her position. Because each of these elected officials has his or (continued...)”) (continued...)

constitutional officer, the Attorney General's duties are set forth in the Maryland Constitution.⁵ Md. Code Ann., Const. Article V, §3. The Attorney General is charged under the Constitution to:

(1) Prosecute and defend on the part of the State all cases pending in the appellate courts of the State, in the Supreme Court of the United States or the inferior Federal Courts, by or against the State, or in which the State may be interested, except those criminal appeals otherwise prescribed by the General Assembly.

(2) Investigate, commence, and prosecute or defend any civil or criminal suit or action or category of such suits or actions in any of the Federal Courts or in any Court of this State, or before administrative agencies and quasi legislative bodies, on the part of the State or in which the State may be interested, which the General Assembly by law or joint resolution, or the Governor, shall have directed or shall direct to be investigated, commenced and prosecuted or defended.

(3) When required by the General Assembly by law or joint resolution, or by the Governor, aid any State's Attorney or other authorized prosecuting officer in investigating, commencing, and prosecuting any criminal suit or action or category of such suits or actions brought by the State in any Court of this State.

⁴ (...continued)

her own constituency, the attorney general and comptroller have every reason to act independently, and little impetus to follow the governor.”).

⁵ There are state constitutional officers that are elected statewide such as the Governor, Attorney General and Comptroller and state constitutional officers that are elected locally such as a state's attorney, sheriff, clerk of the court, register of wills, or orphan's court judges. *See* Md. Code Ann., Const. Article IV, §25 (election of clerks of the court); Article IV, §40 (election of orphans court judges); Article IV, §41 (election of register of wills); Article IV, §44 (election of sheriffs); Article V, §§7 and 9 (election and duties of state's attorneys); Article VI, §§1 and 2 (election and duties of Comptroller).

(4) Give his opinion in writing whenever required by the General Assembly or either branch thereof, the Governor, the Comptroller, the Treasurer or any State's Attorney on any legal matter or subject.

Md. Code Ann., Const., Article V, §3(a). While this constitutional provision provides that the Governor can direct the Attorney General to investigate criminal and civil actions in the State and to aid any State's Attorney investigation, commencing, and prosecuting a criminal suit, this direction relates to the legal business of the state and not the "policy" direction that the General Assembly intended in §10-502(h)(2)(i). *See* Md. Ann. Code, State Government Article ("SG") §6-106(a) ("the Attorney General has general charge of the legal business of the State").

Rather, the "policy direction" in §10-502(h)(2)(i) relates to those in the Executive Branch who are supervised by and serve at the pleasure of the Governor.⁶ SG §3-302("The Governor is head of the Executive Branch of the State Government and ... shall supervise and direct units in that branch."); SG §8-203(a)("The head of each principal department is a secretary, who shall be appointed by the Governor with the advice and consent of Senate."). Indeed, the list of the principal departments within the Executive Branch does not include the Attorney General. *See* SG §8-201(listing the principal departments of the Executive Branch).⁷

C. Inapplicability of §10-502(h)(2)(ii)

⁶ In the 2003 Annual Report of the Open Meetings Compliance Board, we recommended a legislative change in the OMA to expand the definition of "public body" to include a "board, commission, or committee *appointed by an official of the executive branch...*" Report at p. 4. This expansive definition could have included all officials in the Executive Branch including those who are not appointed directly by the Governor. The General Assembly, however, chose not to adopt this definition but instead limited §10-502(h)(2)(i) to those Executive Branch officials "subject to the policy direction" of the Governor, a narrower group of officials. *Compare Eleventh Annual Report of the Open Meetings Compliance Board* p. 4 (2003) and Senate Bill 111 (2004), introduced at the request of the Compliance Board. This change was enacted as Ch. 440, Laws of Maryland 2004.

⁷ Our conclusion that the Attorney General does not serve at the policy direction of the Governor is consistent with the conclusion the Court of Appeals has reached on whether the county sheriffs, also state constitutional officers, are not local government officials and not subject to control of the chief executive authority of the political subdivision. *Rucker v. Harford County, Maryland*, 16 Md. 27, 281 (1989). *See also* 91 *Opinions of the Attorney General* 48 (1991) (Harford County Council lacks the authority to establish a merit system for the Sheriff's office).

Finally, the ACCF was not was not a “public body” under the component of the definition in §10-502(h)(2). The ACCF was appointed not by a public body within the Executive Branch of government but rather by an individual, the Attorney General. Furthermore, as noted previously, the Attorney General is a State constitutional officer, not part of the Executive Branch of State government as that term is used in the Open Meetings Act.

III

Conclusion

Because the AACF was not a public body under the Open Meetings Act, neither the substantive nor the procedural requirements of the Act applied to the meetings of the AACF in the fall of 2010. Thus, no violation occurred.⁸

OPEN MEETINGS COMPLIANCE BOARD

Elizabeth L. Nilson, Esquire
Courtney J. McKeldin
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⁸ The Open Meetings Compliance Board was advised for the purposes of this complaint by Amanda Stakem Conn, Assistant Attorney General at the Maryland Department of Planning, because the Opinions and Advice Division which normally serves as counsel to the Board had contact with the ACCF. Ms. Conn had no contact with the ACCF or other assistant attorney generals that staffed the ACCF.